RD (2)

No. 10-814

Supreme Court, U.S.
FILED
JAN 20 2011
OFFICE OF THE CLERK

In the Supreme Court of the United States

MORTIMER OFF SHORE SERVICES, LTD.,
Petitioner,

v.

FEDERAL REPUBLIC OF GERMANY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION

JEFFREY HARRIS
Counsel of Record
MAX RIEDERER VON PAAR
WALTER E. DIERCKS
RUBIN, WINSTON DIERCKS, HARRIS & COOKE, LLP
1201 CONNECTICUT AVE., N.W.
SUITE 200
WASHINGTON, D.C. 20036
(202) 861-0870
jharris@rwdhc.com

Counsel for Respondent

January 20, 2011

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED

Should this Court grant review:

(1) where that portion of the Second Circuit's decision for which Petitioner seeks review does not conflict with decisions of this Court or give rise to a split between the circuits;

(2) where granting the writ would be immaterial to the outcome of the case because review has not been sought by Petitioner as to the Second Circuit's dismissal of those portions of the Complaint over which the lower courts had subject matter jurisdiction under the commercial activity exception of the Foreign Sovereign Immunities Act; and

(3) where the case does not present a recurring important national issue of federal law with far reaching consequences.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 4

A. The *Mortimer* Decision does not create a conflict among the circuits or run afoul of decisions of this Court 4

B. The relief Petitioner seeks, even if granted, would not change the outcome of the case which resulted in a dismissal of Petitioner's Complaint 7

C. The *Mortimer* decision does not raise recurring issues of federal law with national importance. 8

CONCLUSION 9

TABLE OF AUTHORITIES

CASES

Argentine Republic v. Amerada Hess Shipping Corp.,
488 U.S. 428 (1989) 5

Jackson v. People's Republic of China,
550 F. Supp. 869 (N.D. Ala. 1982) 6

Lehigh Valley R. Co. v. Russia,
21 F.2d 396 (2d Cir. 1927) 6

Mortimer Off Shore Servs. v. Fed. Republic of Germany,
615 F.3d 97 (2d Cir. 2010) 3, 4, 6

Republic of Argentina v. Weltover,
504 U.S. 607 (1992) 2, 5

Republic of Austria v. Altmann,
541 U.S. 677 (2004) 6

Trans-Orient Marine Corp. v. Star Trading & Marine, Inc.,
731 F. Supp. 619 (S.D.N.Y. 1990) 6

Vilas v. Manila,
220 U.S. 345 (1911) 6

World Holdings, LLC v. Fed. Republic of Germany,
613 F.3d 1310 (11th Cir. 2010) 4, 5, 6, 9

STATUTES

Foreign Sovereign Immunities Act 1, 4, 9
28 U.S.C. 1602 1
28 U.S.C. 1604 5

RULES

Fed. R. Civ. P. 59(e) 3

OTHER AUTHORITIES

Certain Matters Arising from the Validation of German Dollar Bonds,
4 U.S.T. 885 ..... *passim*

STATEMENT OF THE CASE

Plaintiff Mortimer Off Shore Services, Ltd. ("Mortimer") filed a complaint against The Federal Republic of Germany in December 2005, seeking payment on bonds it alleged Germany guaranteed. (Pet. App. 15). The Complaint alleged that in 1928, during the Weimar Republic, fourteen German provincial agricultural banks issued bonds that were sold and payable in, among other places, New York City. The Bonds were issued to raise money to improve the agricultural situation in Germany by assisting farmers to reduce their debts and improve agricultural development. Each of the fourteen banks was severally liable for a stated percentage of the Bonds. Some of the issuer banks were located in what became West Germany and some of the issuer banks were located in what became East Germany. The Bonds had a term of 30 years and interest was payable twice a year. In 1933 the German Reich suspended payments on the Bonds. Mortimer alleged that after World War II Defendant Germany guaranteed, succeeded to, and/or assumed the outstanding and unpaid obligations under the Bonds. (Pet. Brief at 4-5).

In response to Mortimer's Complaint, The Federal Republic of Germany filed a motion to dismiss the Complaint, asserting that the district court lacked subject matter jurisdiction, as The Federal Republic of Germany was immune under the Foreign Sovereign Immunities Act, 28 U.S.C. 1602 *et. seq.*, and that, even if the district court had subject matter jurisdiction, the Bonds were unenforceable because Mortimer was required to, and had failed to, comply with the requirement contained in a bilateral treaty between the United States and The Federal Republic of

Germany entitled "Certain Matters Arising from the Validation of German Dollar Bonds" that the Bonds be registered and validated. 4 U.S.T. 885 (the "1953 Treaty").[1] (Pet. App. 48-49).

The district court ruling was in two parts. First, the district court held that, under the commercial activity exception to the broad grant of immunity contained in the FSIA, as interpreted in *Republic of Argentina v. Weltover,* 504 U.S. 607 (1992), The Federal Republic of Germany was not immune because, according to the district court, by assuming liability for the Bonds The Federal Republic of Germany's conduct was in the manner of a private actor in the marketplace and was not immune under the FSIA because the FSIA's commercial activity exception was applicable. (Pet. App. 53-65).

In the second part of the district court's ruling, the district court first held that, as to the portion of the Bonds issued by West German banks, the Bonds were not enforceable because Mortimer had failed to submit the Bonds to the validation procedure as required by the 1953 Treaty. As to the portion of the Bonds issued by East German banks, the district court held that The Federal Republic of Germany was not liable, as West Germany had never assumed liability for the debts of banks in East Germany. (Pet. App. 77-78).

---

[1] The 1953 Treaty became effective on September 16, 1953 and provides, in pertinent part, in Article II, that "No bond. . . shall be enforceable unless and until it shall be validated either by the Board for Validation of German Bonds in the United States established by the Agreement on Validation Procedures, or by the authorities competent for that purpose in the Federal Republic." 4 U.S.T. at 885.

After the district court denied Mortimer's motion to amend judgment pursuant to Federal Rule of Civil Procedure 59(e) and motion to permit Mortimer to file an amended complaint, (Pet. App. 80-83), an appeal to the Circuit Court by Mortimer and a cross-appeal by The Federal Republic of Germany followed. (Pet. App. 1-2).

The Court of Appeals for the Second Circuit affirmed the district court's dismissal, albeit on somewhat different grounds. As to the East German portion of the Bonds, the Circuit Court held that it lacked subject matter jurisdiction because the FSIA granted immunity to The Federal Republic of Germany and the FSIA's commercial activity exception did not apply. The Circuit Court explained that,

> Accession to liability by the rules of customary international law entails no action by the successor state with respect to the commercial activity at issue - the assumption of liability. The state performs no action when it automatically assumes liability.

Mortimer Off Shore Servs. v. Fed. Republic of Germany, 615 F.3d 97, 110 (2d Cir. 2010) (Pet. App. 28).

The Court concluded that,

> Because no "action" within the meaning of § 1605(a)(2) occurs when a successor state accedes to liability, the requirements of FSIA's

> commercial activity exception are not met in that context and jurisdiction under the FSIA based on such an accession will not lie.

Ibid.

As to the West German portion of the Bonds, the Circuit Court held that dismissal was proper where the plaintiff admittedly had failed to comply with the 1953 Treaty's validation requirement. (Pet. App. 43-47).

REASONS FOR DENYING THE WRIT

A. The *Mortimer* Decision does not create a conflict among the circuits or run afoul of decisions of this Court

The decision of the Court of Appeals for the Second Circuit that a foreign state's automatic assumption of liability to pay a debt instrument by operation of law is not an action based upon a commercial activity pursuant to the Foreign Sovereign Immunities Act is correct, and as there is no mature conflict in the courts of appeals, this Court's review is not warranted.

Petitioner principally relies on the Court of Appeals for the Eleventh Circuit's decision in *World Holdings, LLC v. Federal Republic of Germany*, 613 F.3d 1310 (11th Cir. 2010), to support its assertion that there is a conflict among the circuits. This reliance demonstrates a profound misunderstanding of the *World Holdings* decision. In *World Holdings*, the plaintiff sued The Federal Republic of Germany to recover on bonds which had been issued by Germany. There was no question in *World Holdings* that the

commercial activity exception applied if the 1953 Treaty did not expressly conflict with the FSIA because Germany was the issuer of the bonds and not a third party that allegedly became liable on the bonds by state succession. In fact, as Petitioner recognized, in *World Holdings* Germany conceded that the commercial activity exception applied but for the treaty exception. (Pet. Brief at 24). The only issue in *World Holdings* was whether the commercial activity exception did not apply because the FSIA was "subject to existing international agreements. . . .," *i.e.*, the 1953 Treaty. 28 U.S.C. 1604.

Congress made the FSIA "subject to existing international agreements to which the United States is a party at the time of enactment of" the FSIA. 28 U.S.C. 1604. This Court, in *Republic of Argentina v. Weltover*, 504 U.S. 607 (1992), held there is a "treaty exception" to the waiver of immunity in Section 1604 of the FSIA. The "subject to existing international agreements" phraseology "applies when international agreements 'expressly conflic[t]' with the immunity provisions of the FSIA." *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 442 (1989) [*quoting* H.R.Rep. No. 94-1487, at 17 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6616] (alteration in original). In *World Holdings*, the Eleventh Circuit decided that the 1953 Treaty did not expressly conflict with the FSIA and, hence, the broad grant of immunity contained in the FSIA as well as its exceptions, including the commercial activity exception, applied. *World Holdings* did not consider, no less decide, whether assumption of liability by state succession to pay a debt instrument was an action within the meaning of the commercial activity exception to the FSIA. Therefore, there is no conflict between the

Eleventh Circuit's *World Holdings* decision and the Second Circuit's decision in *Mortimer*.

Petitioner also relies on two cases that were decided many decades prior to the enactment of the FSIA and, thus, by definition could not conflict with *Mortimer*'s interpretation of the commercial activity exception to the FSIA. *Vilas v. Manila*, 220 U.S. 345 (1911); *Lehigh Valley R. Co. v. Russia*, 21 F.2d 396 (2d Cir. 1927).

Even the cases cited by Petitioner which were decided after the enactment of the FSIA do not contradict the *Mortimer* decision and form a conflict among the circuits. *Trans-Orient Marine Corp. v. Star Trading & Marine, Inc.*, 731 F. Supp. 619 (S.D.N.Y. 1990), is a district court decision from a district court within the Second Circuit. *Jackson v. People's Republic of China*, 550 F. Supp. 869 (N.D. Ala. 1982) is a district court opinion which also does not create a conflict among the circuits.

Petitioner also argues that *Mortimer* conflicts with this Court's decision in *Republic of Austria v. Altmann*, 541 U.S. 677 (2004). This is not the case. *Altmann* decided that the FSIA applies to pre-FSIA conduct for cases brought after the FSIA's enactment. It did not decide the question at hand in this matter, *i.e.*, whether state succession under international law without a separate affirmative act is enough to be an action so as to invoke the FSIA's commercial activity exception.

In sum, try as it might, Petitioner's argument that the *Mortimer* decision creates a conflict among the circuits or runs afoul of decisions of this Court

completely fails. None of the cases cited by Petitioner supports Petitioner's argument.

B. The relief Petitioner seeks, even if granted, would not change the outcome of the case which resulted in a dismissal of Petitioner's Complaint

Petitioner seeks review from this Court solely on the issue of whether the Second Circuit's decision that there was a lack of subject matter jurisdiction as to the East German portion of the Bonds was incorrect. (Pet. Brief at i). Were the Court to issue the writ and subsequently reverse the Second Circuit, the ultimate outcome of the case, *i.e.*, dismissal of Petitioner's cause of action, would not change.

The Bonds which Petitioner sought to enforce were severally issued by 14 German banks, some of which were in what was formerly West Germany and some in what was formerly East Germany. The Second Circuit in *Mortimer* decided that, as to the East German portion, there was a lack of subject matter jurisdiction. It is only on this ruling that Petitioner seeks this Court's review. As to the West German portion, the Second Circuit decided that the district court had subject matter jurisdiction. However, the Second Circuit went on to decide that Petitioner's cause of action was properly dismissed because Petitioner had failed to comply with the 1953 Treaty's validation requirement. That being the case, had the Second Circuit decided that there was subject matter jurisdiction under the commercial activity exception for the East German portion, as Petitioner argues, the East German portion of the Bonds would have been on the same legal footing as the West German portion. As

such, Petitioner's cause of action as to the East German portion of the Bonds would have been dismissed along with the dismissal on the West German portion of the Bonds for failure to comply with the 1953 Treaty's validation requirement.

Were the Court to grant the Petition, there is no way that any subsequent decision by the Court on the issue presented by the Petition, would alter the ultimate outcome of the case, which is dismissal of the Petitioner's cause of action. Therefore, there is no reason that this Court should grant the Petition.

C. The *Mortimer* decision does not raise recurring issues of federal law with national importance.

Petitioner hyperbolically argues that "the Second Circuit's [ruling] has put at risk billions of dollars of U.S. investments." (Pet. Brief at 34). Petitioner goes on to state that "Inability to enforce sovereign debt instruments will also expose U.S. banking and financial institutions to significant default risk." (Pet. Brief at 35). What Petitioner is really arguing is not that the Second Circuit's interpretation of the commercial activity exception is incorrect, but rather that, as drafted, the commercial activity exception contained in the FSIA, is unwise legislation. This argument ought properly be directly to the legislative branch and surely does not provide a cogent rationale for this Court to grant the Petition. Petitioner's entire argument at Section II.B of the Petition reads exactly like what an advocate would present to a committee of the Congress considering amending the FSIA.

While Petitioner argues that this case presents a frequently recurring legal issue (Pet. Brief at 31), the only cases it cites lend little or no support to this argument. *World Holdings*, *supra.*, does not raise the issue for which Petitioner seeks review because it involves bonds issued by Germany and not allegedly guaranteed by a predecessor government. *Mortimer Off Shore v. The Federal Republic of Germany*, No. 10-1151 (D. Mass filed Sept. 10, 2010), has not been served but appears to be a refiling by the same plaintiff as in the instant case hoping to get a second bite at the apple in another circuit. Lastly, the ongoing case of *Bleier v. Bundesrepublik Deutschland*, No. 08-6254 (N.D. Ill.), does not involve the Bonds at issue in the instant case.

The facts surrounding the application of the FSIA and its exceptions to the unique situation that arose in post-war Germany are not likely to be seen again and do not, in the context of *Mortimer*, raise a recurring issue of federal law with national importance.

CONCLUSION

The Petition is without merit. There is no conflict in appellate authority as to whether a foreign state's automatic assumption of liability to pay a debt instrument by operation of law is an action based upon "commercial activity" under the Foreign Sovereign Immunities Act. The relief Petitioner seeks would not change the ultimate outcome in the instant case. This case does not present a recurring issue of federal law with national importance. Thus, the Petition should be denied and the writ should not issue.

Respectfully submitted,

Jeffrey Harris
Counsel of Record
Max Riederer von Paar
Walter E. Diercks
Rubin, Winston Diercks, Harris
& Cooke, LLP
1201 Connecticut Ave., N.W.
Suite 200
Washington, D.C. 20036
(202) 861-0870
jharris@rwdhc.com

Counsel for Respondent
The Federal Republic of Germany